1993

State of Utah v. Dennis Richard Vigh : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :

Plaintiff-Appellee, : Case No. 930204-CA

v. :

DENNIS RICHARD VIGH, : Priority No. 2

Defendant-Appellant. :

BRIEF OF APPELLEE

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APPEAL FROM CONVICTIONS FOR POSSESSION OF MARIJUANA WITH INTENT TO DISTRIBUTE AND FOR POSSESSION OF COCAINE, SECOND DEGREE FELONIES, IN VIOLATION OF UTAH CODE ANN. §§ 58-37-8(1)(a)(iv), 8(1)(b)(ii), 58-37-8(2)(a)(i), 8(2)(b)(ii) and 58-37-8(5)(a), 8(5)(c) (Supp. 1993), IN THE SECOND DISTRICT COURT IN AND FOR DAVIS COUNTY, STATE OF UTAH, THE HONORABLE RODNEY S. PAGE, PRESIDING.

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JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from convictions for possession of marijuana with intent to distribute, in violation of Utah Code Ann. § 58-37-8(1)(a)(iv) and 8(1)(b)(ii) (Supp. 1993), and possession of cocaine, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) and 8(2)(b)(ii) (Supp. 1993). Because the foregoing offenses were committed within a 1,000 feet of school property, the convictions were enhanced to second degree felonies, under Utah Code Ann. § 58-37-8(5)(a) and 8(5)(c) (Supp. 1993). Defendant also appeals from a conviction for possession of marijuana without tax stamps affixed, a third degree felony, in violation of Utah Code Ann. §§ 59-19-105, 59-19-106 (1990).

This Court has jurisdiction to consider the appeal under Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1993).

STATEMENT OF ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Was the warrant authorizing the search of defendant's residence supported by probable cause?

A magistrate's probable cause determination is given great deference on review. Illinois v. Gates, 462 U.S. 213, 236 (1983). The affidavit supporting a search warrant application must, however, provide a "'substantial basis for determining the existence of probable cause.'" United States v. Leon, 468 U.S. 897, 915 (1984) (quoting Gates, 462 U.S. at 239). The "substantial basis" requirement entails limited review of the magistrate's determination, asking only whether the affidavit contains sufficient factual information upon which a magistrate could have found probable cause. See Gates 462 U.S. at 236.

This Court reviews the trial court's "factual findings underlying the denial of a motion to suppress evidence under a 'clearly erroneous' standard," and the trial court's conclusions of law based thereon are reviewed for correctness. State v. Brooks, 849 P.2d 640, 643 (Utah App.), cert. denied, No. 930182, Aug. 11, 1993 (unpublished order).

2. Was the evidence sufficient to support the jury's finding that counts I-II were committed within 1,000 feet of a school for purposes of sentence enhancement under Utah Code Ann. § 58-37-8(5)(a) and (5)(c) (Supp. 1993)?

In reviewing a claim of insufficiency of evidence, Utah appellate courts view the evidence and all inferences that may reasonably be drawn from it in the light most favorable to the jury verdict. State v. Booker, 709 P.2d 342, 345 (Utah 1985); State v. Lemons, 844 P.2d 378, 381 (Utah App. 1992), cert. denied, 857 P.2d 948 (Utah 1993). A jury verdict will only be

reversed where reasonable minds must have entertained a reasonable doubt that defendant committed the crime of which he was convicted. State v. Johnson, 774 P.2d 1141, 1147 (Utah 1989); Lemons, 844 P.2d at 381.

3. Was the evidence sufficient to support defendant's conviction for possession of cocaine?

The standard of review for this issue is the same as that set forth in issue (2), supra.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Any relevant text of constitutional provisions, statutes and rules pertinent to the resolution of the issues presented on appeal is contained in the body of this brief.

STATEMENT OF THE CASE

The State charged defendant with possession of marijuana with intent to distribute, a third degree felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(iv) and 8(1)(b)(ii) (Supp. 1993) and possession of cocaine, a third degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) and 8(2)(b)(ii) (Supp. 1993). The State further charged the foregoing offenses should be enhanced to second degree felonies, under Utah Code Ann. §§ 58-37-8(5)(a) and 8(5)(c) (Supp. 1993), because they were committed within a 1,000 feet of a school. Additionally, the State charged defendant with possession of marijuana without tax stamps affixed, a third degree felony, in violation of Utah Code Ann. §§ 59-19-105, 59-19-106 (1990) (R. 204).

Defendant filed multiple pro se motions, including a motion to suppress contraband seized during a warrant-supported search of his mobile home in alleged violation of the fourth amendment (R. 40).

After conducting an evidentiary hearing, wherein defendant was represented by privately retained counsel, the trial court denied defendant's motion to suppress (R. 77, 286-87).

A jury trial was held February 4, 1993 and defendant was convicted as charged (R. 155, 160-162).

The trial court sentenced defendant to two concurrent, enhanced terms of one to fifteen years in the Utah State Prison for counts I-II, and one consecutive term of zero to five years in the Utah State Prison for count III (R. 231, 246).

STATEMENT OF THE FACTS

A. The Warrant-Supported Search

The critical facts are set forth in the search warrant affidavit (R. 79, attached as Addendum A). The affidavit was submitted by Officer Gary Haws of the Bountiful City Police Department, an experienced narcotics officer, and had been reviewed by a county attorney (R. 260-62, 324-27), see Addendum A. Officer Haws sought a warrant to search defendant's mobile home for:

> Controlled substances including marijuana and cocaine[.] Items of drug paraphernalia[.] Documents evidencing the sale of controlled substances[.] Documents evidencing the

ownership and occupancy of the residence (and) [m]oney.

Id.

1. Confidential Informant

The affidavit set forth information obtained from a confidential informant who received no "renumeration for the information provided." See Addendum A. The informant told Officer Haws that he/she "[was] knowledgeable about marijuana because [he/she] had used it in the past." Id. The informant then reported that defendant "is engaged in the sale of marijuana and cocaine." Id. Specifically, the informant alleged he/she had "seen" marijuana, cocaine and drug paraphernalia "in [defendant's] presence" and "at [defendant's] residence during the last 10 days." Id. The informant provided Officer Haws with defendant's address, stating that defendant lived "a few blocks south of Crown Billiards," in the "Clearfield Trailer Park, #66." Id.

Additionally, the informant stated that "during the last 10 days" he/she observed marijuana "in [defendant's] presence in his (defendant's) vehicle." See Addendum A. The informant described defendant's vehicle as a "1988 Ford Tempo, two-door, creme in color, license number 217 EVE." Id.

Finally, the informant stated that defendant "was selling a large amount of controlled substance" and that he

consequently kept "a large amount of money" at Pam Tucker's[1] home in Sunset, Utah. See Addendum A. According to the informant, defendant had been under Tucker's home and "may have stashed something there." Id.

2. Verification and Corroboration

Although Officer Haws had not previously known or worked with the informant (R. 262-63), he and other investigating officers were able to verify and corroborate the information provided. Specifically, investigating officers verified that defendant lived in the Clearfield Trailer Park at #66. See Addendum A. The investigating officers were also able to verify that a 1989 Ford with license plate number 217 EVE was registered in defendant's name. Id.

Officer Haws conducted a consensual search of Pam Tucker's home in Sunset, Utah, and discovered "three to four pounds of marijuana underneath the home in a crawl space." See Addendum A. The search also revealed approximately $12,000 in cash. Id.

Finally, Officer Haws obtained defendant's criminal history which revealed that defendant had been previously convicted in June 1986 for arranging the sale of a controlled substance, and attempted distribution of a controlled substance,

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[1] Although not stated in the affidavit, Officer Haws testified at a subsequent hearing that Tucker was defendant's girlfriend (R. 267-69).

both third degree felonies. See Addendum A.[2] Further, defendant was charged with possession of controlled substances in 1980 and in 1983, and as recently as March, 1990, which latter charge was "disposed of by diversion." Id.

Based on the foregoing, the search warrant affidavit requested authority to conduct a daytime search. See Addendum A. This request was buttressed by Officer Haws statement that he believed the "information reliable based upon the fact that the informant has come forward as a citizen and [was] not receiving any renumeration for the information provided." Id.

4. Seizure of Evidence

The search warrant was issued as requested on June 16, 1992 (R. 79, 268, 282), see Addendum A. Pursuant thereto, officers seized approximately one pound of marijuana (R. 369), and baggies, scales, and other drug paraphernalia containing cocaine residue (R. 479-483).

Defendant was arrested just prior to the execution of the search warrant, based on the discovery of contraband at Pam Tucker's home (R. 372). The following items were seized incident to defendant's arrest: defendant's driver's license (which also contained cocaine residue), approximately $6,028 in cash, and a bottle of Prozac, in the name of another individual (R. 329-30, 492-93).

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[2] Officer Haws attached to the instant affidavit, copies of a search warrant affidavit and search warrant executed in December 1985, which apparently lead to defendant's 1986 convictions. See Addendum A.

5. Motion to Suppress

Defendant filed a pro se motion to suppress the evidence seized pursuant to the warrant-supported search of his trailer (R. 40, attached as Addendum B). Specifically, defendant alleged that information concerning his prior criminal history was improperly included in the search warrant affidavit in violation of the fifth, fourth and fourteenth amendments to the United States Constitution. Id.

Defendant retained counsel to represent him at a hearing on his various pro se motions held October 27, 1992 (R. 255). In conjunction with the motion to suppress, defendant's hearing counsel argued defendant's pro se motion for discovery (R. 38-39), wherein defendant requested the State to reveal the confidential informant's identity (R. 256). In support of his motion, defendant examined Officer Haws in an attempt to demonstrate the officer either intentionally, knowingly, or recklessly included false information in the affidavit (R. 259).

The court denied defendant's discovery motion, concluding "there was no substantial preliminary showing that Detective Haws intentionally or knowingly or with reckless disregard for truth, falsely swore relative to any information received from the informant[;]" thus, defendant had not demonstrated a basis for identifying the informant (R. 91, a complete copy of the trial court's Order is attached as Addendum C).

Concerning the motion to suppress, defendant's hearing counsel made no additional argument, but recalled Officer Haws (R. 281-286). Following Officer Haws testimony, the trial court similarly denied defendant's motion to suppress:

> [T]he Court would find that under the law we are required to look at the totality of the circumstances and the information contained in the affidavit for search warrants [sic] and that information needs to be looked at in whether or not it provides a substantial basis for the magistrate to conclude that there was probable cause to believe that there was contraband or evidence of crime located in a certain place and describe that place with such specificity.
>
> In looking at the affidavit that was presented in this particular case, particularly the information provided by the confidential informant, when the reliability of that informant was tested and determined as was done by the officer herein, the Court would find that in looking at the affidavit as a whole, there is a substantial basis from which the magistrate could have concluded that there was contraband or evidence of illegality in the trailer of the defendant and as it was described, that trailer was significant particularly for those executing the warrant to know where to look, and therefore the Court will deny the motion to suppress.

(R. 286). The trial court subsequently filed written findings of fact:

> 1. The confidential informant provided Detective Gay Haws of the Davis Metro Narcotics Strike Force with certain information about the defendant including his place of residence, his use and possession of controlled substances, his vehicle and his criminal background.
>
> 2. The informant provided the detective with information that drugs were being stored at

> the residence of Pam Tucker along with a large amount of cash.
>
> 3. Detective Haws went to the residence of Pam Tucker and located approximately [six] pounds of marijuana and $12,000 in cash consistent with the information provided by the informant.
>
> 4. Detective Haws was able to confirm the information relative to defendant's residence, vehicle and criminal background as provided by the informant.
>
> 5. The informant received no renumeration for any of the information given to Detective Haws.

(R. 92), see Addendum C.

Based on the foregoing findings, the court concluded that the affidavit set forth "sufficient" probable cause for the issuance of the search warrant (R. 93), see Addendum C. Defendant was represented by current defense counsel at trial (R. 298). Defense counsel again raised the motion to suppress, but asserted no new arguments:

> I was not representing Mr. Vigh at that time, but it's [sic] my understanding of case law under those circumstances, I don't have to reobject to the admission of this evidence based on the same judge. So rather than having me object to 38 pieces of evidence, which Mr. McGuire called, I would just like it known that I would object to the introduction of any evidence obtained as a result of the search which we contend was obtained in violation of Mr. Vigh's constitutional guarantees and so I will not be making -- well, I would like this to serve as a continuing objection to any evidence obtained as a result of either of the search warrants.

(R. 306-07). In reasserting the motion to suppress, defense counsel incorporated evidence seized incident to defendant's arrest (R. 307).

B. Cocaine Residue

James Gaskill, of the Weber State University Crime Laboratory, tested residue samples taken from the various drug paraphernalia seized from defendant's trailer, as well as from defendant's driver's license (R. 479-83, 492-493). In all, Gaskill performed three separate tests on the samples: 1) a cobalt thiocyanate test, which revealed the presence of cocaine hydrochloride; 2) a gold bromide test, which revealed the presence of recrystallized cocaine; and 3) a gas chromatography test, which similarly confirmed that the samples contained cocaine (R. 480-81, 492-93).

Although there was a sufficient amount of residue upon which to conduct the foregoing tests, Gaskill was not able to measure or otherwise quantify the cocaine residue (R. 485). Further, Gaskill noted that the residue amounts were consumable, but it was not likely the residue was a sufficient amount "for any kind of reaction on the part of the individual who consumed it" (R. 486).

C. **Sentence Enhancement**

Investigating officers made several measurements to determine that defendant's mobile home was located within 1,000 feet of Pioneer Adult Rehabilitation Center. The officers

obtained a blueprint of Clearfield City from the planning division of Clearfield City Corporation (R. 416, Exh. 35).[3] After determining the blueprint was drawn to a scale of one inch for every 400 feet, the officers drew a 1,000 foot radius emanating from the center of the mobile home park, which radius cut through the middle of the rehabilitation center property. Id.

Additionally, Officer Haws used a roller-meter to measure the distance from defendant's trailer to the rehabilitation center, stepping off two different routes (R. 355-58). The first pedestrian route measured 983 feet (R. 357). The second, more direct route, measured 722 feet. Id. Both routes required trespassing across railroad tracks running between the rehabilitation center and the mobile home park (R. 360, Exh. 35). The officer also climbed through some holes in a six foot chain-link fence surrounding the mobile home park (R. 359-60). Officer Haws estimated that a non-trespassory pedestrian route between the center and defendant's trailer would accede 1,000 feet, but did not make an exact measurement with the roller-meter (R. 360-61).

SUMMARY OF THE ARGUMENT

The trial court correctly concluded that the search warrant affidavit set forth a substantial basis for the magistrate's probable cause determination. The affidavit

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[3] As depicted on the blueprint (Exh. 35), defendant's mobile home park is outlined in red and the rehabilitation center is outlined in blue (R. 416).

properly included defendant's criminal history as corroborative of the confidential informant's allegations concerning defendant's involvement in drug trafficking. Based on the officer's corroboration of defendant's criminal history and other information provided by the informant, there is no clear error in the trial court's determination that the informant was reliable. Thus, the trial court's affirmance of the magistrate's probable cause determination should be upheld.

The evidence was sufficient beyond a reasonable doubt to support the jury's finding that counts I-II were committed within 1,000 feet of a school and were thus subject to an enhanced penalty. Defendant does not dispute evidence that his mobile home was located within a 1,000 foot radius of the school. Rather, defendant contends the method of measurement should take into account physical and legal barriers separating the school and the site of the offense. However, the straight line method for measuring the statutory distance used here is consistent with the policy objectives underlying the school zone enhancement provision and should be expressly adopted by the Court as the proper method for determining the statutory distance.

As for defendant's challenge to the sufficiency of the evidence to support his conviction for cocaine possession, the Court should not even consider it because defendant has not properly marshaled the evidence supporting the jury's verdict. Even if the Court were to consider the merits of defendant's claim, there was ample evidence before the jury to demonstrate

that defendant's possession of the cocaine residue was knowing and intentional.

ARGUMENT

POINT I

THE SEARCH WARRANT AFFIDAVIT SETS FORTH A SUBSTANTIAL BASIS FOR THE MAGISTRATE'S PROBABLE CAUSE DETERMINATION AND THERE IS NO CLEAR ERROR IN THE TRIAL COURT'S DETERMINATION CONCERNING THE CONFIDENTIAL INFORMANT'S RELIABILITY

Defendant challenges the trial court's affirmance of the magistrate's probable cause determination, alleging that the search warrant affidavit 1) improperly set forth defendant's criminal history and 2) "contains no indication of veracity or reliability regarding the confidential informant[.]" Br. of App. at 9-11. Contrary to defendant's assertions, his criminal history was properly included in the affidavit as corroborative of the confidential informant's allegation of defendant's criminal conduct. Moreover, there is no clear error in the trial court's finding that the affidavit was sufficient to establish the confidential informant's reliability. Accordingly, the trial court's affirmance of the magistrate's probable cause determination was proper.

A. Deferential Review of Magistrate's Probable Cause Determination

When a search warrant is challenged as having been issued without probable cause, the reviewing court does not conduct a de novo review of the magistrate's determination of probable cause; rather, to uphold the warrant, the reviewing

court must simply conclude that the magistrate had a "substantial basis" for determining that probable cause existed. State v. Babbell, 770 P.2d 987, 991 (Utah 1989); State v. Ayala, 762 P.2d 1107, 1110 (Utah App.), cert. denied, 773 P.2d 45 (Utah 1989). In conducting its examination, the reviewing court "should consider a search warrant affidavit 'in its entirety and in a common-sense fashion.'" Babbell, 770 P.2d at 991 (quoting State v. Anderson, 701 P.2d 1099, 1102 (Utah 1985)); State v. Purser, 828 P.2d 515, 517 (Utah App. 1992). "Finally, the reviewing court should pay 'great deference' to the magistrate's decision." Babbell, 770 P.2d at 991 (quoting Illinois v. Gates, 462 U.S. 213, 236 (1983)).

B. Totality-of-the-Circumstances and Informant Reliability

An informant's veracity, reliability and basis of knowledge are factors to be considered in determining whether, under the totality of the circumstances, probable cause exists. Purser, 828 P.2d at 517. See Gates, 462 U.S. at 233. However, "[t]hey are not strict, independent requirements to be 'rigidly extracted' in every case." State v. Hansen, 732 P.2d 127, 130 (Utah 1987) (quoting Gates, 462 U.S. at 230). Rather, their significance varies under the circumstances of each case. Purser, 828 P.2d at 517 (citing State v. Bailey, 675 P.2d 1203, 1205 (Utah 1984)). For example, "if the circumstances as a whole demonstrate the truthfulness of the informant's report, a less strong showing is required." Purser, 828 P.2d at 517.

C. The Instant Case

Applying the Gates test to Officer Haws' affidavit, the truthfulness of the informant's report is adequately demonstrated. While the first time informant had not previously supplied information to any of the investigating officers, that fact is not critical to the probable cause determination because the informant's veracity and reliability is otherwise demonstrated. Purser, 828 P.2d at 517. See also United v. Harris, 403 U.S. 573, 581-582 (1971) (upholding search warrant affidavit based on information gleaned from a first time informant; "this Court [has] never suggested that an averment of previous reliability was necessary"). Accord State v. Germano, 559 A.2d 1031, 1035 (R.I. 1989); Meija v. State, 761 S.W.2d 35, 39 (Tex. App. 1988); State v. Payne, 271 N.W.2d 350, 351 (Neb. 1978).

1. Confidential Informant's Veracity and Reliability

Indeed, "[c]ourts have consistently approved the issuance of search warrants where the informant's knowledge is based on personal observation." Purser, 828 P.2d at 517. See also State v. Stromberg, 783 P.2d 54, 57 (Utah App. 1989), cert. denied, 795 P.2d 1138 (Utah 1990); State v. White, 851 P.2d 1195, 1199 (Utah App. 1993). Here, the affidavit clearly states the basis of the informant's knowledge was his/her first hand observation of defendant's criminality. See Addendum A. Moreover, the observations were recent, occurring in the "last 10 days" prior to the warrant's issuance. Id.

The informant's veracity is further buttressed by the fact that he/she received nothing in exchange for the information provided. See Addendum A. Purser, 828 P.2d at 517; State v. Blaha, 851 P.2d 1205, 1207 (Utah App. 1993); State v. Brooks, 849 P.2d 640, 645 (Utah App. 1993), cert. denied, No. 930182 (Utah Aug. 11, 1993). Similarly demonstrative of the informant's veracity is the informant's admission against his/her penal interest, that he/she had previously used marijuana.[4] See Addendum A. Harris, 403 U.S. at 583-84 ("Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility[.]"). Accord People v. Turcotte-Schaeffer, 843 P.2d 658, 661 (Colo. 1993); State v. Erwin, 789 S.W.2d 509, 511 (Mo. App. 1990); State v. O'Connor, 692 P.2d 208, 212 (Wash. App. 1984).

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[4] At trial, defendant was represented by current counsel, who questioned Officer Haws concerning a search of the confidential informant's residence conducted sometime prior to the execution of the instant search warrant (R. 361-62). The officer testified that approximately six pounds of marijuana was discovered and that the informant had not been charged with any criminal conduct as a result of the search. Id. Defense counsel did not further pursue the matter below, nor has he specifically addressed it on appeal.

Rather, on appeal defendant merely asserts that the affidavit "contradicts itself" because it states "that the confidential informant is a citizen informant who is not receiving renumeration, and then affirmatively assert[s] that the informant is a known user of controlled substances." Br. of App. at 10. However, contrary to defendant's allegation, the foregoing conduct is not contradictory. Although the informant was previously involved in drugs, he/she, for whatever reason, decided to cooperate with law enforcement in this case.

2. Independent Corroboration of Significant Facts

Additionally, the informant's reliability was manifest by the officers' independent corroboration of the significant facts. See Addendum A. Purser, 828 P.2d at 517. As alleged by the informant, the officers found approximately four pounds of marijuana in the crawl space of Pam Tucker's home, as well as $12,000 in cash. See Addendum A. The officers were also able to verify defendant's address, and vehicle, consistent with the information provided by the informant. Id. Because the informant was found to be reliable concerning the above information, his/her assertion that defendant was involved in drug trafficking was therefore likely to be similarly reliable. See Gates, 462 U.S. at 244 (because an informant is shown to be right about some things, he is probably right about other facts that he has alleged including the claim that the object of the tip is engaged in criminal activity).

As further corroboration of the informant's allegations, Officer Haws obtained defendant's criminal history which indicated defendant had two prior convictions for drug related offenses in 1986, as well as a 1990 charge for possession of a controlled substance which was "disposed of by diversion." See Addendum A. Relying on Brooks, 849 P.2d at 644, defendant asserts his criminal record cannot properly "be considered in the probable cause determination." Br. of App. at 9. Defendant's reliance on Brooks is misplaced.

In Brooks, the Court determined that information Brooks was under investigation for drug trafficking in a neighboring jurisdiction, and also had a criminal history of drug related offenses, did nothing to establish probable cause that he was involved in drug trafficking at the time the search warrant was issued. 849 P.2d at 644. However, the central issue in Brooks was not the propriety of including Brooks' criminal history in the affidavit, but whether the informant's controlled buys from Brooks, which were also set forth in the affidavit, provided a substantial basis for the magistrate's probable cause determination. 849 P.2d at 643-45. Thus, neither the parties, nor the Court, focused on the criminal history issue raised here.

This lack of focus is demonstrated in the Court's comments concerning inclusion of Brooks' criminal history in the search warrant affidavit. Specifically, the Court neither reviewed nor acknowledged relevant authority from the United States Supreme Court, the Utah Supreme Court and this Court recognizing that a defendant's prior criminal history is properly included in a search warrant affidavit as corroborative of the informant's assertions of criminality. See Jones v. United States, 362 U.S. 257, 271 (1960) (Court upheld search warrant affidavit containing statement that Jones had previously admitted using narcotics on the ground that the information "made the charge against [Jones] much less subject to scepticism than would be such a charge against one without such a history"); Bailey, 675 P.2d at 1206 (upholding search warrant affidavit where there

was "prior verification of significant facts[,]" including "a prior police record of the individual suspected of having committed the crime"); Stromberg, 783 P.2d at 55 (noting defendant's prior conviction for unlawful possession corroborated informant's statements); State v. Buford, 820 P.2d 1381, 1385 (Utah App. 1991) (finding affidavit adequately established informant reliability based, in part, on officers' verification of defendant's prior criminal record). Accord Commonwealth v. Spano, 605 N.E.2d 1241, 1246 (Mass. 1993) (independent police corroboration of informant's allegations properly included defendant's criminal history); People v. Maldonado, 465 N.Y.S.2d 958, 962 (N.Y. Sup. 1983) (defendant's criminal history "is corroborative in nature -- that is, there is much less skepticism surrounding an informant's information than would be the case if the police were not aware of the defendant's prior, drug-related criminal history"); State v. Pannebaker, 714 P.2d 904, 907 (Colo. 1986) (defendant's prior criminal record of drug-related offenses corroborated details of informant's tip).

Further, in State v. Singleton, another panel of this Court rejected a staleness challenge to the search warrant affidavit on the ground the affidavit recited facts "indicating [Singleton] was involved in continuous and ongoing criminal activity," including delineation of "a substantial history of controlled substance violations." 854 P.2d 1017, 1021 (Utah App. 1993). Thus, "[v]iewed under the totality of the circumstances," the Singleton court found the "information contained in the

affidavit sufficiently demonstrate[d] probable continuous and contemporaneous criminal activity at defendant's residence." Id.

On the other hand, the only indication Brooks was involved in an ongoing drug trafficking scheme was a "concerned citizen complaint that occurred some nine months earlier." Brooks, 849 P.2d at 644. Consequently, the Brooks affidavit, unlike the Singleton affidavit, was found inadequate to establish the probable existence of *continuous* criminal activity. The Court thus determined that inclusion of Brooks' criminal history did not contribute to the probable cause determination in that case. Brooks, 849 P.2d at 644. See also State v. Potter, 221 Utah Adv. Rep. 29, 30 (Utah App. 1993) (concluding that fact Potter was under investigation by local drug agencies and fact that his companion was a convicted drug user, without more, failed to establish controlled substances would presently be found in his trailer).

However, had the facts alleged in the Brooks affidavit established ongoing criminal activity, Brooks' criminal record may well have properly contributed to the probable cause determination. See, e.g., Singleton, 854 P.2d at 1021. Additionally, although the Brooks panel failed to consider the issue, Brooks' criminal record was at least corroborative of the informant's allegations and was arguably properly included in the affidavit on that ground. See Jones, 362 U.S. at 271; Bailey, 675 P.2d at 1206; Stromberg, 783 P.2d at 55; Buford, 820 P.2d at 1385. See also State v. Lee, No. 920566-CA, slip op. at 12 (Utah

App. October 22, 1993) (recognizing affiant officer's knowledge of suspect's "history of substance abuse and sales," helped to corroborate confidential informant's observations of criminality). For these reasons, the Brooks analysis is meaningful only as applied to the unique facts of that case and should not be read to preclude consideration of a suspect's criminal history in all cases. Thus, Brooks notwithstanding, defendant's criminal history was properly included in the search warrant affidavit if for no other purpose than to corroborate the informant's allegations of defendant's criminality.

Based on the foregoing analysis of the search warrant affidavit, defendant's assertions fail to demonstrate any clear error in the trial court's determination that the informant's reliability was adequately established (R. 286). See also (R. 92), see Addendum C. Brooks v. State, 431 S.E.2d 466 (Ga. App. 1993) (trial court's determination of informant reliability subject to a clearly erroneous standard of review). Accord Brooks, 849 P.2d at 643 ("factual findings underlying the denial of a motion to suppress evidence" are reviewed under a 'clearly erroneous' standard). The trial court's affirmance of the magistrate's probable cause determination was proper and should be upheld.

POINT II

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE JURY'S FINDING THAT THE OFFENSES OCCURRED WITHIN 1,000 FEET OF A SCHOOL FOR PURPOSES OF SENTENCE ENHANCEMENT UNDER UTAH CODE ANN. § 58-37-8(5)(a) and 8(5)(c) (SUPP. 1993)

Defendant contends "[t]here is insufficient evidence to support the jury verdict that [d]efendant's actions took place within 1,000 feet of a school." Br. of App. at 11. In so arguing, "[d]efendant asks the Court to define the most direct non-trespassory route available as the proper measurement" for calculating the distance from his mobile home to the school for purposes of sentence enhancement under Utah Code Ann. 58-37-8(5)(a), (c) (Supp. 1993). Br. of App. at 16. Defendant's argument is inconsistent with the underlying policy objectives of the statutory enhancement scheme and should be rejected.

A. Sufficiency Standard

The power of this Court to review a jury verdict challenged on sufficiency of evidence is "quite limited." State v. Moore, 802 P.2d 732, 783 (Utah App. 1990). As this Court has recognized,

> [i]n challenging the sufficiency of the evidence, the burden on the defendant is heavy. Defendant must 'marshal all evidence supporting the jury's verdict and must then show how this marshaled evidence is insufficient to support the verdict even when viewed in the light most favorable to the verdict.'

State v. Lemons, 844 P.2d 378, 381 (Utah App. 1992) (citations omitted), cert. denied, 857 P.2d 948 (Utah 1993).

B. The Instant Case

Although defendant has marshaled the evidence supporting the jury's verdict, Br. of App. at 12-13, he has not demonstrated that, viewed in its most favorable light, the evidence is insufficient to support the jury's enhancement verdict. Specifically, defendant does not dispute evidence that his mobile home is located within a 1,000 foot radius of the rehabilitation center. Br. of App. at 16. Rather, notwithstanding the evidence, defendant contends the straight line method used to calculate the statutory distance (R. 416, Exh. 35) is improper because it does not take into account chain-link fencing surrounding the mobile home park, or railroad property rights. Br. of App. at 16.[5] Defendant suggests a proper measuring system under the statute would take into account physical and legal barriers between the school and the site of the offense. Defendant's tortuous reading of the enhancement provision should be rejected.

1. Utah's Enhancement Provision

Utah Code Ann. § 58-37-8(5)(a)(ix) (Supp. 1993) provides for the enhancement of certain drug related offenses committed "within 1,000 feet of any structure, facility, or grounds included in Subsections 5(a)(i) through (viii)[.]

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[5] Defendant also asserts that the rehabilitation center is surrounded by a barbed wire fence. Br. of App. at 16. However, defendant provides no record support for this assertion. State v. Cook, 714 P.2d 296, 297 (Utah 1986); State v. Bingham, 684 P.2d 43, 46 (Utah 1984) (reviewing court cannot consider matters outside of the record).

Subsection (5)(a)(ii) prohibits the commission of drug related offenses "in a public or private vocational school or post-secondary school or on the grounds of any of those schools[.]"[6]

The Utah Supreme Court upheld the constitutionality of

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[6] As noted, section 58-37-8(5)(a) enumerates several locations or zones where, if a drug related offense is committed therein, the perpetrator is subject to enhanced "penalties and classifications under [s]ubsection (5)(b)[.]" However, subsection (5)(b) provides only for the enhancement of first degree felony convictions. The enhancement of convictions which are "less than a first degree felony" is addressed in subsection (5)(c), which subsection is not expressly referenced in subsection (5)(a).

The legislature's failure to expressly refer to both subsection (5)(b) *and* subsection (5)(c) in subsection (5)(a) is merely a technical omission and should not be read to prohibit enhancement of convictions other than first degree felony convictions. Indeed, the school zone enhancement provision only makes sense when subsection (5)(a) is read to incorporate both subsection (5)(b) and subsection (5)(c). The only logical construction of subsection (5) is that the legislature intended to enhance any conviction for a drug-related offense committed within the prohibited areas specified in subsection (5)(a). To construe the statute otherwise is to defeat its purpose. See Grant v. Utah State Land Board, 26 Utah 2d 100, 485 P.2d 1035 (Utah 1971) ("where there is ambiguity or uncertainty in a portion of a statute, it is proper to look to the entire act in order to discern its meaning and intent; and if it is reasonably susceptible of different interpretations, the one should be chosen which best harmonizes with its general purpose"); RDG Assoc./Jorman Corp. v. Indus. Comm'n., 741 P.2d 948, 951 (Utah 1987) ("a proper construction of the statute must further its purposes"); Gleave v. Denver & Rio Grande Western R.R., 749 P.2d 660, 672 (Utah App.) (same), cert. denied, 765 P.2d 1278 (Utah 1988). See also *Sutherland's Stat. Constr.* §46.05 at 103 (5th Ed.) ("a statutory subsection may not be considered in a vacuum, but must be considered in reference to the statute as a whole").

Finally, defendant has not complained of the matter on appeal and the State's suggested construction has been implicitly recognized by the Court. See State v. Stromberg, 783 P.2d 54, 59-60 (Utah App. 1989) (affirming without comment Stromberg's ehanced third degree felony conviction for unlawful possession of marijuana within 1,000 feet of a public school), cert. denied, 795 P.2d 1138 (Utah 1990).

section 58-37-8(5) in State v. Moore, 782 P.2d 497 (Utah 1989). Specifically, Moore argued that the school zone enhancement provision violated equal protection because it "treat[ed] drug dealers in small towns differently from those in large cities." Id. at 503. The court's comments in rejecting Moore's constitutional challenge suggest that a straight line method for measuring the statutory distance is proper: "'The bright line test' is based strictly on distance from the school, regardless of the town's population or configuration." Id. The "bright line test" articulated in Moore is consistent with the supreme court's recognition of the policy objectives underlying the legislature's enactment of the school zone enhancement provision:

> [U]nder the police power, the state legislature has taken measures to protect the public health, safety, and welfare of children of Utah from the presumed extreme potential danger created when drug transactions occur on or near a school ground.

Id.

This Court has similarly upheld the constitutionality of the enhancement provision, and has also recognized the legislature's intent to create a "drug-free *zone*" around schools "to protect children from the influence of drug-related activity." State v. Stromberg, 783 P.2d 54, 60 (Utah App. 1989) emphasis added), cert. denied, 795 P.2d 1138 (Utah 1990).

2. Federal Authority is Persuasive

It is significant that section 58-37-8(5) was "fashioned" after the federal Controlled Substances Penalties Amendments Act of 1984. Stromberg, 783 P.2d at 59 n.3. The federal act, which "increases the penalty for 'distributing, possessing with intent to distribute, or manufacturing a controlled substance' within enumerated distances from schools, colleges, universities, and certain youth facilities[,]'" has also "withstood a number of constitutional challenges." Id. Because Utah's enhancement provision is modeled after the federal act, interpretative federal case law is persuasive. See. e.g., Malan v. Lewis, 693 P.2d 661, 670 (Utah 1984) ("Case law developed under the Fourteenth Amendment may be persuasive in applying Article I, § 24, " of the Utah Constitution).

At least three federal courts of appeal have expressly rejected arguments similar to defendant's, determining that the "straight line" method is clearly contemplated by the plain meaning of the federal act. See United States v. Clavis, 956 F.2d 1079, 1088 (11th Cir.) ("the statutory distance must be measured by a straight line method rather than a pedestrian travel route"), cert. denied, ___ U.S. ___, 112 S.Ct. 2979 (1992); United States v. Watson, 887 F.2d 980, 981 (9th Cir. 1989) ("[W]e hold that the distance between the school and the sale should be measured by a straight line and not by any "pedestrian" route of travel."); United States v. Ofarril, 779 F.2d 791, 792 (2nd Cir. 1985) (rejecting argument that the

statutory distance should be measured by pedestrian route rather than by straight line as "tortuous" of the statute's plain meaning), cert. denied, 475 U.S. 1029 (1986). Cf. United States v. Holland, 810 F.2d 1215, 1219 (D.C. Cir.) (purpose of federal act was to create a "1000-foot zone of protection" around schools), cert. denied, 481 U.S. 1057 (1987). See also United States v. Robles, 814 F.Supp. 1249, 1251 (E.D.Pa. 1993) ("The distance from the protected zone is measured by straight line, not by pedestrian route."). Accord State v. Wims, 847 P.2d 8, 12 (Wash. App. 1993) ("We adhere to the measurement of the prohibited zone as the radius of a circle emanating from the location of the school grounds.").

The reasoning behind adoption of a straight line method for measuring the statutory distance is sound. As noted by the Court of Appeals for the Ninth Circuit, the 1,000 foot zone of prohibition around schools is

> designed to protect school-children from the direct and indirect dangers posed by the narcotics trade. School children are not known for taking what adults may conclude would be the most appropriate routes to and from school. Only a straight line measurement creates a readily ascertainable zone of protection. . . . This intent to create a 'drug-free zone around schools,' would be defeated if dealers were allowed to escape prosecution by creating circuitous routes to their narcotic transactions.

Watson, 887 F.2d at 981. The Court of Appeals for the Eleventh Circuit similarly reasoned that

> [t]he uncertainties created by the way a child meanders, or a drug dealer or buyer walks, is antithetical to the expressed

> intention of Congress to create a drug-free zone around each school. The way to create a definite and identifiable zone is by extending radii outward around the property on which the school is located.

Clavis, 956 F.2d at 1079.

Based on the foregoing, this Court should reject defendant's reading of Utah's school zone enhancement provision and expressly adopt a straight line method for measuring the statutory distance. Only the straight line method is consistent with the legislature's clear policy objective of creating drug-free zones around Utah's schools.

POINT III

THE EVIDENCE WAS SUFFICIENT BEYOND A REASONABLE DOUBT TO SUPPORT DEFENDANT'S CONVICTION FOR POSSESSION OF COCAINE

Defendant's challenge to the sufficiency of the evidence to support his conviction for cocaine possession, Br. of App. at 18-20, should be rejected for failure to comply with the marshaling requirements of State v. Moore, 802 P.2d 732, 783 (Utah App. 1990). As previously noted in Point II, supra, the power of this Court to review a jury verdict challenged on sufficiency of evidence is "quite limited." Id. Defendant must first marshal all the supporting evidence, and then show how the marshaled evidence is insufficient to support the jury's verdict, even when viewed in its most favorable light. State v. Lemons, 844 P.2d 378, 381 (Utah App. 1992) (citations omitted), cert. denied, 857 P.2d 948 (Utah 1993).

A. Defendant's Failure to Marshal

Defendant has failed to meet this purposefully heavy burden. Rather than marshalling all the evidence supporting the jury's verdict and then demonstrating how the marshaled evidence is insufficient to support his conviction for cocaine possession, defendant asserts that cocaine soiled paper money is so prevalent in our society "that one-third of all the people deplaning at Salt Lake City from flights from Chicago, and carrying paper money, could be charged and convicted of possession of cocaine." Br. of App. at 19. Significantly, although large amounts of cash were seized from defendant's person and from his trailer, there was no allegation below that the money was "cocaine soiled." Thus, defendant's argument completely ignores the supporting evidence. The Court should refuse to consider defendant's insufficiency claim based on his failure to properly marshal the evidence supporting the jury's verdict.

B. Evidence Supports Jury's Determination That Defendant's Possession Was Knowing and Intentional

Even if this Court were to consider defendant's sufficiency challenge, there was ample evidence to support defendant's conviction. Defendant does not argue that the State failed to prove he exercised control over the cocaine residue seized from his person, and from his trailer. Br. of App. 17. Nor does he dispute the narcotic character of the residue seized. Id. Defendant's only complaint is "that there was insufficient cocaine to justify a conviction." Id. Specifically, defendant

asserts that society's resources are better spent prosecuting suspects apprehended in possession of larger, quantifiable amounts of controlled substances. Br. of App. at 20.

Neither this Court nor the Utah Supreme Court have expressly determined whether a particular quantity of narcotics is necessary to sustain a conviction for possession of a narcotic drug. State v. Warner, 788 P.2d 1041, 1043 (Utah App. 1990).[7] Rather, in Utah "[t]he determinative test is possession of a narcotic drug, and not useability of a narcotic drug." State v. Winters, 12 Utah 2d 139, 396 P.2d 872, 874 (Utah 1964). Further, "the key in prosecuting for unlawful possession of narcotics is proving that 'the accused exercised dominion and control over the drug with knowledge of its presence and narcotic character.'" Warner, 788 P.2d at 1043 (quoting Winters, 396 P.2d at 874).

The visible amount of drug in defendant's possession, along with other circumstantial evidence, was sufficient for the jury to determine that defendant's possession was knowing and intentional. State v. Fox, 709 P.2d 316, 319 (Utah 1985). It is significant that the visible cocaine residue in evidence was discovered inside drug paraphernalia seized from defendant's trailer (R. 479-81), premises over which defendant exercised control and exclusive occupancy. Id. Cocaine residue was also discovered inside the plastic flap of defendant's driver's

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[7] However, both have acknowledged that "'several courts have held that no particular quantity of narcotics is necessary to sustain a conviction for possession of a narcotic drug.'" Warner, 788 P.2d at 1043 (quoting State v. Winters, 396 P.2d 872, 874 (Utah 1964)).

license (R. 492-93), a personal effect over which he had special control. Fox, 709 P.2d at 319. Thus, viewed in its proper light on appeal, the evidence presented at trial provides substantial support for the jury's verdict. This Court should reject defendant's sufficiency challenge.

CONCLUSION

Based on the foregoing arguments, the trial court's denial of defendant's motion to suppress should be upheld and defendant's convictions affirmed.

RESPECTFULLY SUBMITTED this 15th day of November, 1993.

JAN GRAHAM
Attorney General

Marian Decker
MARIAN DECKER
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, to GLEN T. CELLA, KING & KING, attorney for appellant, P.O. Box 320, Kaysville, Utah 84037, this 15th day of November, 1993.

Marian Decker

ADDENDA

ADDENDUM A

MELVIN C. WILSON
Davis County Attorney
800 West State Street
Farmington, Utah 84025
Telephone: 451-4300

IN THE CIRCUIT COURT OF DAVIS COUNTY, STATE OF UTAH

CLEARFIELD DEPARTMENT

THE STATE OF UTAH,	:	AFFIDAVIT FOR
In Re: Search of the mobile home located at 442 South State, #66, Clearfield, a single wide trailer beige in color with dark brown trim, occupied by Dennis Richard Vigh and the vehicle described as a 1989 Ford Tempo, license #217 EVE, vin #1FAPP31X7KK103453, registered to Dennis Vigh.	:	SEARCH WARRANT

COUNTY OF DAVIS)

STATE OF UTAH) ss.

Before Alfred C. VanWagenen, Circuit Court Judge, the undersigned, being first duly sworn, deposes and says that there is probable cause to believe that on the premises and vehicle described as follows:

> The mobile home located at 442 South State, #66, Clearfield, Utah, a single wide trailer beige in color with dark brown trim, occupied by Dennis Richard Vigh; and a 1989 Ford Tempo, license number 217 EVE, vin #1FAPP31X7KK103453, registered to Dennis Richard Vigh.

there is now certain property or evidence described as:

> Controlled substances including marijuana and cocaine
> Items of drug paraphernalia
> Documents evidencing the sale of controlled substances
> Documents evidencing the ownership and occupancy of the residence
> Money

and that said property or evidence was unlawfully acquired and is being unlawfully possessed and is evidence of the crime of possession of controlled substances.

The facts to establish the issuance of this warrant are as follows:

1. Affiant received information from a confidential informant that Dennis Richard Vigh is engaged in the sale of marijuana and cocaine. The informant stated that Vigh resides in Clearfield at the Clearfield Trailer Park, #66, located a few blocks south of Crown Billiards. The informant stated that marijuana was seen in the presence of Vigh personally by the informant and the informant is knowledgeable about marijuana because the informant has used it in the past. The informant also indicated that cocaine and paraphernalia had been seen by the informant in Vigh's presence. Both of the items had been seen at Vigh's residence during the last 10 days.

2. The informant stated that Vigh had been under the home of Pam Tucker in Sunset and believed he may have stashed something there. The informant further stated that the informant believed that Vigh also kept a large amount of money at Tucker's residence.

3. The informant stated that during the last 10 days the informant had also observed marijuana in Vigh's presence in his vehicle. The vehicle was described as a 1988 Ford Tempo, two-door, creme in color, license number 217 EVE.

4. The informant stated that Vigh was selling a large amount of controlled substances sufficient to store house a large

amount of money which was kept at Tucker's residence and that of Vigh's mother, who lives in Sunset.

5. Affiant went to Pam Tucker's residence located at 261 West 1425 North, Sunset and conducted a search of that residence. During the search, affiant located three to four pounds of marijuana underneath the home in a crawl space. Affiant also located a large amount of money totalling approximately $12,000.

6. Affiant spoke with Detective Dave Nance who stated that he went to the Clearfield Trailer Park and observed it to be located at 442 South State. He stated he looked at #66 and observed it to be a single wide mobile home, beige in color with brown trim. Affiant spoke with personnel at Clearfield Police Department who stated that the manager of Clearfield Trailer Park indicated that Dennis Vigh lived at that address.

7. Affiant contacted Bountiful dispatch and was informed that Vigh has a 1989 Ford with license 217 EVE, vin #1FAPP31X7KK103453 registered to him.

8. Affiant obtained a criminal history on Vigh which showed that Vigh was convicted on June 2, 1986 of Arranging for the Sale of a Controlled Substance, a third degree felony and Attempted Distribution of a Controlled Substance, a third degree felony. Affiant observed a search warrant in that case, a copy of which is attached and made a part of this affidavit. Affiant also noted that Vigh was charged with Possession of Cocaine in March, 1990. The records of the Davis County Attorneys Office shows that this matter was disposed of by diversion. The

criminal record also showed that Vigh was charged with possession of controlled substances in 1980 and 1983.

9. Affiant believes that based upon affiant's independent investigation, the information supplied by the informant is accurate. Affiant further believes that the information is reliable based upon the fact that the informant has come forward as a citizen and is not receiving any remuneration for the information provided.

10. Affiant has been involved in the investigation of controlled substance violations for over one year and during that time has been involved in numerous searches of residences involving individuals who sell controlled substances. In each of those instances, drug paraphernalia has been located. Affiant is also aware from experience and courses attended on the investigation of such offenses, that individuals who sell controlled substances often maintain records of such sales in their residences.

WHEREFORE, affiant prays that a Search Warrant be issued for the search of the above-described premises and vehicle and the seizure of the items being searched for.

_____

Affiant

Subscribed and sworn to before me this _____ day of June, 1992.

_____

Circuit Court Judge

LOREN D. MARTIN
Davis County Attorney
Courthouse
Farmington, Utah 84025
Telephone: 451-3227

IN THE CIRCUIT COURT OF DAVIS COUNTY, STATE OF UTAH
LAYTON DEPARTMENT

IN THE DISTRICT COURT OF DAVIS COUNTY, STATE OF UTAH

THE STATE OF UTAH, :

:

In Re: Search of the ✓ SEARCH WARRANT
premises described as :
450 South 546 East, Apt. C,
Clearfield, Utah. :

COUNTY OF DAVIS)

STATE OF UTAH) ss:

THE STATE OF UTAH TO ANY PEACE OFFICER IN THE COUNTY OF DAVIS:

Proof by affidavit having this day been made before me by Kent Lewis, Davis County Metro Narcotic Strike Force, that he has reason to believe that in the below-described premises there are items which constitute evidence of the commission of a crime.

YOU ARE THEREFORE COMMANDED in the daytime, or nighttime KLB. to make immediate search, without notice KLB. of the premises described as:

450 South 546 East, Apt. C,
Clearfield, Utah,

and search for the following property:

Marijuana,
Paraphernalia associated with the use or packaging of marijuana,
Mushrooms,
Chemical psilocyn.

And if you find the same or any part thereof to bring it forthwith before me at the Circuit Court, County of Davis, or retain such property in your custody subject to the order of this Court.

Given under my hand and dated this 12th day of December, 1985.

K Roger Bean

Circuit Court Judge

LOREN D. MARTIN
Davis County Attorney
Courthouse
Farmington, Utah 84025
Telephone: 451-3227

IN THE CIRCUIT COURT OF DAVIS COUNTY, STATE OF UTAH
LAYTON DEPARTMENT

IN THE DISTRICT COURT OF DAVIS COUNTY, STATE OF UTAH

THE STATE OF UTAH,	:	
	:	AFFIDAVIT FOR
In Re: Search of the premises described as 450 South 546 East, Apt.C, Clearfield, Utah.	:	SEARCH WARRANT
	:	

COUNTY OF DAVIS)

STATE OF UTAH) ss:

Before K. Roger Bean, Circuit Court Judge, an officer having power to issue a warrant for the arrest of a person charged with a public offense, the undersigned, being first duly sworn, deposes and says that he has probable cause to believe that on the premises which are described as:

450 South 546 East Apt C
Clearfield, Utah,

there is now certain property described as:

Marijuana,
Paraphernalia associated with the use or packaging of marijuana,
Mushrooms,
Chemical psilocyn.

The facts to establish the issuance of this warrant are as follows:

1. On September 19, 1985, Agent Paul Rapp of the Davis County Metro Narcotics Strike Force purchased marijuana from Dennis Vigh.

2. On September 24, 1985, Agent Rapp purchased psilocyn mushrooms from Dennis Vigh.

3. A confidential informant told Brian Wallace, Clinton Police Department, that Dennis Vigh was selling marijuana from his residence at 450 South 546 East, Apt C., Clinton, Utah.

4. A different confidential informant told Steve Hill, Clearfield Police Department, that he or she, the informant, was a resident of Townhouse Apartments which is the complex of the above listed apartment, and that he had seen many persons coming and going from the apartment at all hours of the night and day and that the informant had witnessed exchanges at the door. Such a pattern of traffic is typical of that where drugs are being sold.

5. A third confidential informant told Detective William Holthaus of Clearfield Police Department that he had been in the above-described apartment and had seen a dresser drawer filled with marijuana on October 21, 1985.

6. A fourth confidential informant advised Agent Rapp and Agent Allen Larsen of the State Narcotics and Liquor Law Enforcement Bureau, that Dennis Vigh sells marijuana from the above-described location and this informant introduced Agent Rapp to Vigh for the purpose of making the buys mentioned in

paragraphs 1 and 2 herein. The information from this informant is therefore considered reliable.

7. Your affiant is supervisory agent of the Davis County Metro Narcotics Strike Force and in that capacity received the information outlined herein from the agents and officers named.

WHEREFORE, affiant prays that a search warrant be issued for the search of the above-described premises and the seizure of any of the said items.

Affiant

Subscribed and sworn to me this 12th day of December, 1985.

Circuit Court Judge

STATE OF UTAH)
) ss RETURN OF SEARCH WARRANT
COUNTY OF DAVIS)

I hereby certify, and return, that by virtue of the within Search Warrant to me directed, I have searched for the goods and chattels therein named, at the place therein described: (Strike either (1) or (2), whichever is inapplicable)

(1) and that I have such goods and chattels before the Court, described as follows:

PLEASE SEE ATTACHED LIST OF EVIDENCE TAKEN.

(2) and that I have been unable to find such goods and chattels.

I, JOHN M. LYBBERT, the officer by whom this Warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me on the Warrant

John M Lybbert
Peace Officer, Affiant

Subscribed and sworn to before me this 13th day of Dec., 19

K. Roger Bean
Judge

Lagun City POLICE DEPARTMENT

EVIDENCE AND PROPERTY REPORT

12-13-85

EVIDENCE	RECOVERED	FOUND	STORED	DATE COLLECTED	BIN NUMBER	CASE NUMBER
☒	☐	☐	☐	12-13-85		12135-0021

OWNER-SUSPECT	ADDRESS	PHONE NUMBER
DENNIS R. VIGH	5466 45TH ST #C CLFD	524-9518

PERSONS ARRESTED	TYPE OF CASE
NONE	Adult

LOCATION WHERE PROPERTY WAS COLLECTED

SAME.

OFFICER SUBMITTING PROPERTY	TIME AND DATE SUBMITTED	CLERK RECEIVING PROPERTY	TIME AND DATE
LYCKBERT	0900 12-13-85	—	

DESCRIPTION OF PROPERTY (SERIAL NUMBER COLOR STYLE ETC)

1. OHAUS SCALES - BALANCE BEAM (YELLOW & RED TRAYS W/ MARIJUANA DUST IN YELLOW TRAY) W/WEIGHTS
2. TWO BOXES PLASTIC BAGS. - 1- ZIPLOC STORAGE BAG 10 9/16 X 11 IN. 1- GLAD SANDWICH BAGS. 6 1/2 X 5 1/2 IN.
3. BAG W/ MARIJUANA (MARIJUANA FOUND IN DRAWER W/ SCALES & BAGS)
4. LARGE BAG OF MUSHROOMS (62.5 GRAMS)
5. LARGE BAG OF MARIJUANA (221.8 GRAMS)
6. 2 COFFINHEEN CANS W/ MARIJUANA ROACH BUTTS INSIDE & PRESCRIPTION BOTTLE TO CINDY DICKSON CONTAINING 1 DILANTIN TABLET.
7. FORK BENT INTO ROACH CLIP W/ ROACH BUTT CLIPPED
8. SMALL GLASS BOTTLE W/ LIQUID RESIDUE.
9. COPY OF CITATION ISSUED TO "DENNIS R. VIGH."

RELEASED TO	TIME AND DATE	RETURNED BY	TIME AND DATE
RELEASED TO	TIME AND DATE	RETURNED BY	TIME AND DATE
RELEASED TO	TIME AND DATE	RETURNED BY	TIME AND DATE
RELEASED TO OWNER	TIME AND DATE	RELEASED BY	TIME AND DATE
DISPOSED OF BY	TIME AND DATE	WITNESSED BY	

CLERK'S MEMO
LEGIBILITY OF TYPING OR PRINTING UNSATISFACTORY IN THE DOCUMENT WHEN RECEIVED.

Rev. 3-85 83

Layton City POLICE DEPARTMENT

EVIDENCE AND PROPERTY REPORT

12-13-85

EVIDENCE	RECOVERED	FOUND	STORED	DATE COLLECTED	BIN NUMBER	CASE NUMBER
X				12-7-85		[illegible]

OWNER/SUSPECT	ADDRESS	PHONE NUMBER
DENNIS R. VIGH	526 E 425 S #C CLFD	825-9575

PERSONS ARRESTED	TYPE OF CASE
NONE	ASSIST.

LOCATION WHERE PROPERTY WAS COLLECTED

SAME.

OFFICER SUBMITTING PROPERTY	TIME AND DATE SUBMITTED	CLERK RECEIVING PROPERTY	TIME AND DATE
LYBBERT	0900 12-7-85		

DESCRIPTION OF PROPERTY (SERIAL NUMBER, COLOR, STYLE ETC)

1C. SUCKETS CAN W/ MARIJUANA SEEDS.
1I PACKS FOUND W/ THE SUCKETS CAN.
1G. TELEPHONE BILL & 3 PAPERS.
1B. TRAY W/ RAZOR BLADE, SCISSORS, CLIP & ROACH BUTT.

CLERK'S MEMO
LEGIBILITY OF TYPING OR PRINTING UNSATISFACTORY IN THE DOCUMENT WHEN RECEIVED.

RELEASED TO	TIME AND DATE	RETURNED BY	TIME AND DATE
RELEASED TO	TIME AND DATE	RETURNED BY	TIME AND DATE
RELEASED TO	TIME AND DATE	RETURNED BY	TIME AND DATE
RELEASED TO OWNER	TIME AND DATE	RELEASED BY	TIME AND DATE
DISPOSED OF BY	TIME AND DATE	WITNESSED BY	

MELVIN C. WILSON
Davis County Attorney
800 West State Street
Farmington, Utah 84025
Telephone: 451-4300

IN THE CIRCUIT COURT OF DAVIS COUNTY, STATE OF UTAH

CLEARFIELD DEPARTMENT

THE STATE OF UTAH, :

In Re: Search of the mobile home: SEARCH WARRANT
located at 442 South State, #66,
Clearfield, a single wide trailer:
beige in color with dark brown
trim, occupied by Dennis Richard :
Vigh and the vehicle described
as a 1989 Ford Tempo, license :
#217 EVE, vin #1FAPP31X7KK103453,
registered to Dennis Vigh. :

COUNTY OF DAVIS)

STATE OF UTAH) ss.

THE STATE OF UTAH TO ANY PEACE OFFICER IN THE COUNTY OF DAVIS:

Proof by Affidavit having this day been made before me by Gary Haws, Davis Metro Narcotics Strike Force, that there is probable cause to believe that in the below-described premises and vehicle there is property or evidence which:

(1) Was unlawfully acquired and is unlawfully possessed.

(2) Is evidence of the crime of possession of controlled substances.

YOU ARE THEREFORE AUTHORIZED AND ORDERED to search the premises and vehicle described as:

The mobile home located at 442 South State, #66,

Clearfield, Utah, a single wide trailer beige in color with dark brown trim, occupied by Dennis Richard Vigh; and a 1989 Ford Tempo, license number 217 EVE, vin #1FAPP31X7KK103453, registered to Dennis Richard Vigh.

and search for the following property or evidence:

Controlled substances including marijuana and cocaine
Items of drug paraphernalia
Documents evidencing the sale of controlled substances
Documents evidencing the ownership and occupancy of the residence
Money

If the same or any part thereof is discovered and seized, it may be brought before the magistrate or retained in police custody subject to further court order.

This Warrant shall be served in the daytime, and must be served within ten days from the date of issuance.

Given under my hand and dated this _____ day of June, 1992.

_____
Circuit Court Judge

ADDENDUM B

DENNIS R. VIGH
Defendant Pro Se
2668 N. 375 W.
Sunset UT. 84015

IN THE SECOND DISTRICT COURT, DAVIS COUNTY, STATE OF UTAH

THE STATE OF UTAH V. Plantiff DENNIS R. VIGH DEFendant	SEVERANCE MOTION; DISCOVERY MOTION; BILL OF PARTICULARS; MOTION IN LIMINE; SUPPRESION MOTION; MOTION TO DISMISS; MOTION TO BE GIVEN ADEQUAT TIME TO SUBMIT MOTIONS; with include PETITION FOR MOTIONS HEARING, and ORDER FOR RECORD TRANSCRIPTS: case Nos. 921700336 and 921700334

DEFENDANT above hereby and herein Moves this court for a severance of these two (2) cases; For a Discovery of both cases; For a Bill of Particulars for both cases; For a motio in Limine for both cases, (to insure "FAIR" trial); For a Suppres sion of search warrant (and all fruts of); To dismiss many of the charges, (as they shouldn't have been bound over); To Disclose Identity of C.I.'[redacted]

[redacted]

) and to disclose all evidence, Police reports (rough drafts also), all witnesses, (expecially those which will testify, and to disclose the witnesses that will testify), "Ect..." To allow the defendant adequate time to submit

motions (as I am acting Pro se, and have been appointed an inadequate advisor, who does NOT have MY best interests in mind, and has broken his verbal promise to write and submit my requested motions, and has broken his contract with the bar association to wit: client confidentiality, and should THEREFORE be Debard!) and this case is very complex and will require many motions to insure "FAIR" trial, and states

I. SEVERANCE MOTION

1. That defendants Right to a "fair" trial requires a severance.
2. That the two Circuit Court cases NO. 921000534FS and 921-548 were scheduled for Prelim. hearing on rite after another and were bound over one rite after the other, Yet somehow a case was bound over inbetween defendants (No. 921700335. which allowed above named defendant to be tried by the same Judge (Rodney S. Page) on both of his cases, No. 921700336 and 921700334.
3. That defendant sincerely believes case No. 921700335 should be his case number, and that the Prosicuti is tring to pull a dirty trick on him.
4. That severance should be granted in accordance with R.C.P. 12,9.

II. DISCOVERY MOTION

1. That defendant requires a discovery of All the things that are to be used in his trials in order to adequately Prepare

for his trials.

2. That the discovery is to include, but not be limmited to: ALL Witnesses; Police reports, (to include all rough drafts "ect..."); ALL EVIDENCE To be used; True identity of confidencial informant (in accordance with AMENDMENT VI CONSTITUTION OF THE UNITED STATES and AMENDMENT IX and AMENDMENT XIV.)

3. That a discovery must be granted in accordance to Rule (16)(b)(3) UTAH R.C.P.

III. BILL OF PARTICULARS

1. That a Bill of Particulars is required to ensure "FAIR" Trial for the defendant.

2. That Bill of Particulars must be granted in acordance to RULE UT. R.C.P.

IV. MOTION IN LIMINE

1. That a motion in limine is required to insure defendants Right to "fair" trial.

2. That Prior charges and convictions must be kept confidential!

3. That Amended Informations must be Reamended as they state "and/or defendant having previously been convicted..."

4. That enhance must be dropped! (see Weaver V. Graham, 450 U.S. 24, 67 L. Ed 2d 17, 101 S. Ct. 960 (1981)(The ex post facto clause prohibits the enactment of laws that either impose punishments for acts Not Punishable at the time they were committed, or increase Punishment over that previously Prescribed.)

V. SUPPRESION MOTION

1. That the search warrant is invalid, it was obtained by an erroneous affidavit; It was signed by a parcial biased Judge (Rojer K. Bean).
2. Gary Haws used the fact that I was charged (and conned into pleading guilty to) with arranging the sales of Cont. Sub. to obtain search warrant.
3. That that violates my Right to AMENDMENT V, and AMENDMENT IV, and AMENDMENT XIV of the UNITED STATES CONSTITUTION (see allso XIV Amendment).
4. That all frutes of search warrant must also be suppresed.
5. That many other things in defendants two (2) cases must be suppresed
6. That a Discovery will reveal to the defendant additional things that he wants suppresed, and that THEREFORE he will REQUIRE a second suppression hearing.

VI. MOTION TO DISMISS

1. That a motion to dismiss was submitted on or about July 29, 1992.
2. That in addition to items listed on above stated motions ALL CHARGES MUST BE DISMISSED as defendant Requested a Postponement of prelim. and was denied his request even though The Prosecution was granted a Postponement and failed to get letter of Postpone-

ment, or re-scheduled notice to defendant until approx. one (1) month after the prelim was held.

3. That defendant wasn't given INFORMATION for either case until Prelim. had begun, and only got them after requesting them (and after Prosecution scurried to copy machine.). (see documents attatched)(also see 77-1-6 (1)(b) UT. C.C. P.

VII. MOTION TO BE GIVEN ADEQUATE TIME TO SUBMIT MOTIONS

1. That defendant requires much time to think of, wright up, and submit motions.
2. That defendant believes Michael D. Murphy is Prosecutin him; He Promised defendant many motions and supplied None (0).
3. That all motions submitted by defendant, Pro se, at least five (5) days Prior to trial should be heard in accordance with Rule 12 (b) UT R.C.P.

(See also U.S. V. Begay, 937 F. 2d 515 (10th Cir. 1991)(constitution Requires that criminal defendant be given opportunity to present evidence that is relevant, material, and favorable to defense and Freeman V. Dept. of Corrections, 949 F. 2d 360 (10th Cir. 1991)(Pro se litigants Pleadings are to be construed liberally and held to less stringent standards than formal Pleadings drafted by lawyers; if court can reasonably

read Pleadings to state valid claim on which litigant could Prevail, it should do so despite failure to cite Proper legal authority, confusion of legal theories, Poor syntax and Sentence construction, or litigants unfamiliarity with Pleading requirements.) this brand new 10th Cucirt (or circuit) case followes the U.S. supreme Court decision in Haines v. Kerner, 404 U.S. 519, 30 L.Ed 2d 652, 92 S.Ct. 594 (1972).

VIII. PETITION FOR MOTIONS HEARINGS

1. Defendant Pro se, Requests this court to schedule a/or some, motions hearing(s).

XIV ORDER FOR RECORD TRANSCRIPTS

1. That the Court reporter of the Central Arrainment Court shall transcribe and transmit all tapes of Preliminary Hearing Case No. 92100534 FS held on July 20, 1992 to the second Dist. Court, for defendants motions hearing.

Respectfully Submitted.

Dennis Vigh
DENNIS R. VIGH, Pro se

DAVIS COUNTY ATTORNEY

MELVIN C. WILSON

July 14, 1992

Dennis Richard Vigh
Inmate - Davis County Jail
Farmington, Utah

Re: State v. Dennis Richard Vigh
Case Nos. 921000534 & 921000548

Mr. Vigh:

The purpose of this letter is to advise you that the preliminary hearings in the above referenced matters previously scheduled for Friday, July 17, 1992 have been re-scheduled to Monday, July 20, 1992 at 2:00 p.m. by the Court.

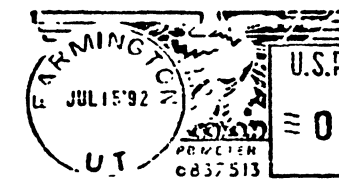
Sincerely,

William K. McGuire
Deputy Davis County Attorney

WKM:km

xc: Cindy Fessler
Circuit Court Clerk

OFFICE OF THE DAVIS COUNTY ATTORNEY
DAVIS COUNTY JUSTICE COMPLEX
800 WEST STATE STREET
P.O. BOX 618
FARMINGTON, UTAH 84025-0618



PRIVILEGED
MAIL

Dennis Richard Vigh
Inmate - Davis County Jail

I hereby CERTIFY That
I received this Letter/court noti
long after the Prelimanry
hearing occured.

Dennis Vigh.

CERTIFICATE OF SERVICE

"I CERTIFY That I hand delivered a copy of the foregoing Pleadings to:

Second dist. Ct.
800 W. State St.
Farmington UT 84025

On this 24th Day of Aug, 1992."

Dennis Vigh
DENNIS R. VIGH Pro se

ADDENDUM C

William K. McGuire #2192
Davis County Attorney's Office
800 West State Street
Farmington, Utah 84025
Telephone: 451-4300

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT

IN AND FOR THE COUNTY OF DAVIS, STATE OF UTAH

THE STATE OF UTAH,	:	ORDER ON DEFENDANT'S MOTIONS
Plaintiff,	:	
vs.	:	
DENNIS R. VIGH,	:	Case Nos. 921700334 & 0336
Defendant.	:	Hon. Rodney S. Page, Judge

A series of motions filed by the Defendant came on for hearing before the above-entitled Court on the 27th day of October, 1992. The defendant was present and represented by David Grindstaff, the State was represented by William K. McGuire. The Court heard testimony relative to some of the motions and received memoranda from the parties relative to the other motions and the Court having considered the testimony and the memoranda, makes the following rulings and orders on the motions:

MOTION TO SEVER

The Court has heretofore granted defendant's motion to sever trial on the two files charging the defendant with criminal offenses.

MOTION TO DISCOVER

The defendant requested copies of all police reports in both cases as well as witnesses to be called in each. Pursuant to

the answer of the plaintiff, it appears that all police reports and witnesses have been submitted to the defendant and this request has been complied with fully by the State of Utah.

Defendant requested disclosure of the confidential informant in Case No. 921700334 and testimony was taken relative to the necessity of disclosure of the confidential informant. Based upon such testimony, the Court enters the following:

Findings of Facts

1. The confidential informant provided Detective Gary Haws of the Davis Metro Narcotics Strike Force with certain information about the defendant including his place of residence, his use and possession of controlled substances, his vehicle and his criminal background.

2. The informant provided the detective with information that drugs were being stored at the residence of Pam Tucker along with a large amount of cash.

3. Detective Haws went to the residence of Pam Tucker and located approximately 6 pounds of marijuana and $12,000 in cash consistent with the information provided by the informant.

4. Detective Haws was able to confirm the information relative to defendant's residence, vehicle and criminal background as provided by the informant.

5. The informant received no remuneration for any of the information given to Detective Haws.

The Court having entered its findings of fact, now makes the following:

Conclusions of Law

1. There was no substantial preliminary showing that Detective Haws intentionally or knowingly or with reckless disregard for truth, falsely swore relative to any information received from the informant.

2. That probable cause existed for the issuance of the search warrant based upon the information provided by the informant and verified by Detective Haws.

The Court having entered its Findings of Fact and Conclusions of Law hereby Orders that pursuant to Rule 505 of the Utah Rules of Evidence, the identity of the informant should not be disclosed.

BILL OF PARTICULARS

Defendant's request for a bill of particulars was sufficiently answered by the State of Utah.

MOTION IN LIMINE

Defendant requests that language concerning the enhancement due to a prior conviction not be mentioned at trial nor be read at trial and that the enhancement be dropped from the language of the charge. The Court hereby orders that a bifurcated proceeding should be followed in the trial of the case wherein the enhancement language relative to the prior conviction shall not be read to the jury as a part of the charge nor shall it be referred to during the trial of the underlying charge. In the event that the defendant is convicted of the underlying offense, the determination of a prior conviction shall then be presented for enhancement purposes. The Court further Orders that the

enhancement is not violative of the ex post facto provisions of the United States Constitution, but that the prior conviction merely enhances a subsequent act to make it more serious than it would otherwise be had the individual not been convicted.

MOTION TO SUPPRESS

The Court heard testimony relative to defendant's motion to suppress and based upon such testimony enters the following Findings of Fact.

Findings of Facts

1. The confidential informant provided Detective Gary Haws of the Davis Metro Narcotics Strike Force with certain information about the defendant including his place of residence, his use and possession of controlled substances, his vehicle and his criminal background.

2. The informant provided the detective with information that drugs were being stored at the residence of Pam Tucker along with a large amount of cash.

3. Detective Haws went to the residence of Pam Tucker and located approximately 6 pounds of marijuana and $12,000 in cash consistent with the information provided by the informant.

4. Detective Haws was able to confirm the information relative to defendant's residence, vehicle and criminal background as provided by the informant.

5. The informant received no remuneration for any of the information given to Detective Haws.

The Court having entered its Findings of Facts, now makes the following:

Conclusions of Law

1. That there was probable cause contained in the affidavit sufficient for the issuance of a search warrant on defendant's residence.

2. That no showing of bias on the part of the judge or of any erroneous information is present.

The Court having entered its Findings of Fact and Conclusions of Law hereby Orders that defendant's motion to suppress is denied.

MOTION TO DISMISS

The Court has previously ruled on defendant's motion to dismiss finding that the bind over of the matters were pursuant to sufficient probable cause for the sitting magistrate to bind the matters over for trial. The Court has further reviewed the record of the proceedings consistent with plaintiff's memorandum and finds that there was no error in failing to postpone the preliminary hearing at the request of the defendant, nor any problem with the defendant being advised of the charges and provided with information relative to the charges and therefore defendant's motion to dismiss is denied.

DATED this 9th day of November, 1992.

BY THE COURT:

Rodney S. Page

RODNEY S. PAGE, Judge

00160601

CERTIFICATE OF MAILING

I certify that I mailed an unexecuted copy of the foregoing Order on Defendant's Motions, with postage prepaid thereon, to David L. Grindstaff, at 395 South 600 East, Salt Lake City, Utah 84102, this 30th day of October, 1992.

Kathy Morris
Secretary